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NTSB Order No. EA-3968

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of August, 1993

KELLY DON CRITTENDEN, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Docket 101-EAJA-SE-10865

OPINION AND ORDER

The Administrator has appealed from the initial decision issued by Administrative Law Judge William R. Mullins on October 8, 1991, granting, in part, an application for an award of attorney fees and other expenses to the applicant under the Equal Access to Justice Act, as amended, 5 U.S.C. §504 (EAJA) and the Board's Rules implementing that Act, 49 C.F.R. Part 826.[1] The

[1]The law judge's initial EAJA decision is attached. The Administrator submitted a brief on appeal, to which applicant did

law judge found that the Administrator was not substantially justified in bringing some of the charges; therefore, he approved EAJA compensation for those charges. As set forth in this opinion, we grant the appeal.

In an emergency revocation order, the Administrator alleged that applicant: 1) on September 24, 1989, violated the Federal Aviation Regulations (FAR) 14 C.F.R. sections 91.9, 105.13, and 105.17(a) when he acted as pilot-in-command and, without prior approval from airport management, allowed parachutists to jump from the aircraft while it was over the traffic pattern at Tahlequah Airport; 2) on October 18, 1989, operated an aircraft that was not airworthy, in violation of FAR sections 91.29(a) and 91.9; 3) on November 4 and 5, 1989, violated FAR sections 91.29(a) and 91.9 by operating an unairworthy aircraft; 4) on November 5, 1989, violated FAR sections 105.13, 105.17(a) and (b) by allowing others to make parachute jumps from the aircraft onto Tahlequah Airport without prior airport management approval and by himself parachuting onto the airport.

At the initial hearing, the law judge found that the Administrator proved by a preponderance only the violations of 91.9 and 105.17(a) that were alleged to have occurred on September 24, 1989, and suspended applicant's private pilot certificate for four months. See Transcript (Tr.) at 395 for the law judge's findings and discussion. No appeals from this

(..continued)
not reply. In addition, the applicant did not file a supplemental request and brief for a cost-of-living adjustment to his fee award, as permitted by NTSB Order No. EA-3884 (1993).

decision were filed.

Regarding the EAJA claim, the law judge decided that the Administrator was not substantially justified in bringing the airworthiness charges and, thus, granted, in part, the EAJA application for attorney fees and expenses in the amount of $2,741.00. It is this decision that the Administrator appeals.

In the initial decision on the merits, the law judge stated as a factual finding that the applicant checked the logbook of N124K, a Cessna 182, after the aircraft received its annual inspection in August 1989, to see that the paperwork was in order. A letter dated October 10, 1989, from the Bethany, Oklahoma, Flight Standards District Office (FSDO), alerted the applicant that the airworthiness of N124K regarding the flight of September 24 was being investigated. Mr. Crittenden testified that he then carefully went over the logbooks and corresponding paperwork for the aircraft with the aircraft owner (Mr. Lander).[2] He claimed that when he looked at the logbooks, all the work had been signed off by an A&P; it was his impression that the work had been done correctly. Tr. at 354. The law judge found that the evidence failed to show whether Mr. Crittenden, as a private pilot, "would or should have known that the aircraft was unairworthy...." Tr. at 405. The law judge specifically stated that he did not reach the issue of whether the aircraft was unairworthy since he found the evidence did not show that

[2]Respondent testified that Mr. Lander is neither a private pilot nor an Airframe and Powerplant (A&P) mechanic. Tr. at 352.

respondent reasonably should have known that the aircraft was not airworthy.

In the EAJA decision, the law judge found that the Administrator's position on the airworthiness claim was substantially justified in the investigatory stage, but not in the pleading and discovery stage. He determined that although a "solid basis in law" existed, a "reasonable basis in truth for the facts alleged" did not. EAJA Opinion at 9. In addition, he found that the alleged facts did not support the legal theory advanced.

The Administrator maintains that substantial justification existed in the proceeding against applicant on the section 91.29(a) charges. To evaluate this argument it must be determined whether there was a reasonable basis in truth for the facts alleged;[3] that it was "justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1986). An evaluation of the evidence is necessary to ascertain whether it can reasonably be interpreted to support the Administrator's allegations. U.S. Jet, EA-3817 at 10, n.14.

The information that the Administrator relied on to initiate the airworthiness case was derived from the observations of two FAA inspectors. FAA Inspector Don Cook, who had over 30 years

[3]Contrary to the view suggested in the law judge's EAJA decision, this inquiry does not require a finding that the FAA could have met its burden of proof on the merits. U.S. Jet, Inc. v. Administrator, NTSB Order No. EA-3817 (1993) at 9, citing Federal Election Comm'n v. Rose, 806 F.2d 1081 (D.C. Cir. 1986).

experience in aircraft maintenance,[4] testified that on October 18, 1989, he observed conditions in N124K that "might render that aircraft unairworthy." Tr. at 65. These conditions were as follows: 1) cowling separation and missing fasteners; 2) cracks in the elevator and horizontal stabilizer; 3) improper hinge across the top of the door instead of the side; 4) corrosion on front landing gear; 5) door hinges with wire instead of hinge pins; 6) overhead light hanging from the ceiling with no bulb; 7) improper repairs to the horizontal stabilizer and elevator; 8) step mounted over the right main landing gear; and 9) only one seat and restraint, for the pilot. Tr. at 65-71, 83. Mr. Cook stated that the applicant was piloting the aircraft.

Mr. Cook said he saw the aircraft again on November 8th. He testified that the door was in the same condition, but seemed unsure whether the step was different. Tr. at 84-85. In addition, the horizontal stabilizer and elevator hinge point were improperly repaired; the engine cowling was still separated; the door hinges still had wires through them instead of pins; the corrosion on the front gear was painted over; and the light fixture was still hanging from the wires.

The Administrator also relied on the observations of Don Loftin, an FAA operations inspector who accompanied Mr. Cook on October 18th. He testified that he saw N124K land with Kelly

[4]Mr. Cook testified that he had an A&P mechanic's certificate, had held an inspection authorization, and had performed annual and 100-hour inspections, made repairs, and performed general maintenance on Cessna 182 aircraft.

Crittenden as the pilot-in-command and two passengers. There were no seats or restraints on the aircraft for these passengers. He stated that he sent the applicant a letter of investigation dated October 10, 1989, listing some of the airworthiness discrepancies about which Mr. Cook testified. In his testimony, Mr. Loftin did not specifically describe the possible airworthiness problems that were present on October 18th, but opined that the aircraft was unairworthy because it did not conform to its original type certificate and was not in a condition for safe flight.[5] Tr. at 110. He testified that he also saw the aircraft on November 8th and that his recollection of the condition of the aircraft coincided with Mr. Cook's testimony.

The law judge, in the EAJA decision, correctly pointed out that, of the 12 photographs introduced into evidence by the Administrator to document the airworthiness charges, only four were taken on October 18th; the others were taken in April and May of 1989 (before the annual inspection of August 1989) and thus are not reliable evidence that the aircraft was not airworthy on October 18, and November 4 and 5, 1989. However, that these photographs are not evidence that the aircraft was unairworthy on the alleged dates is not fatal to the charge.

The law judge found that, "at best," the Administrator's position was "marginal" under the preponderance of the evidence

[5]Yet, in response to the question of "Was [the aircraft] unsafe?" he stated, "I don't think so." Tr. at 110.

standard.[6] EAJA Opinion at 10. He concluded that, based on precedent, the Administrator in this instance had to prove the airworthiness charges by clear and convincing evidence[7] and inferred that, based on this standard, "the Administrator did not maintain a marginal, much less a solid, position...." Id. As discussed supra in footnote 3, a substantial justification finding is separate from the legal standards pertinent to the merits of the case.

The firsthand account of the possible violations, as related by Mr. Cook, provided the Administrator with substantial justification to initially prosecute the matter. Accord U.S. Jet, supra, at 5. We are not reviewing whether the Administrator did, in fact, prove that the applicant violated section 91.29(a) but, rather, whether the Administrator's position was substantially justified enough that "a reasonable person could think it correct, that is, if it has a reasonable basis in law

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[6]As the Administrator stressed, the law judge appears to have relied on the language in Justice Brennan's concurrence in Pierce. Justice Brennan equated substantial justification with more than mere reasonableness. 487 U.S. at 578. He continued,

> "In my view, we should hold that the Government can avoid fees only where it makes a clear showing that its position had a solid basis (as opposed to a marginal basis or a not unreasonable basis) in both law and fact.

Id. at 579.

This is not the standard adopted by the majority, who found that a substantially justified position need not necessarily be correct, but instead must be one that "a reasonable person could think [is] correct." Id. at 567, n.2.

[7]Citing Administrator v. Proud, 42 C.A.B. 1014, 1017 (1965), he surmised that this standard is required when "'the periodic inspection was complete and properly accomplished.'" EAJA Opinion at 9-10.

and fact." Pierce v. Underwood, 487 U.S. at 566, n.2.

It is our conclusion that the FAA's allegations had a reasonable basis in truth sufficient to sustain the prosecution of this case. There has been no evidence presented that would indicate that the Administrator's pursuit of the matter was unreasonable. Mr. Cook testified that another FAA inspector gave him photographs taken in April 1989 of the aircraft's various discrepancies. He stated that he first saw the aircraft himself on May 25, 1989, and that all the same discrepancies depicted in the April photographs were still present in May, except that the crack in the cowling was covered by a patch. Tr. at 81. These discrepancies were included in Mr. Loftin's letter of October 10, 1989, to the applicant. Before seeing the aircraft on October 18th, Mr. Cook had determined that the step on the landing gear and the alteration of the door were not approved. Tr. at 64, 68. The conditions depicted in the photographs taken in April, May, and October 1989, were basically the same as those Mr. Cook observed on October 18th. He further testified that the state of the aircraft on November 8th was nearly the same. See supra at 5. This testimony illustrates that the Administrator had a reasonable basis in truth to initiate and pursue the case.

In the EAJA decision, the law judge concluded that, even if all the facts alleged in the complaint were true, there would not have been sufficient legal justification for the airworthiness claim because the Administrator could not establish that Mr. Crittenden should have known that the aircraft was not airworthy.

It is clear (and the Administrator concedes) that in order to prove a violation of section 91.29(a) by a pilot-in-command, the Administrator must establish that the pilot should have been aware that a specific condition rendered the aircraft unairworthy. See Administrator v. Parker, 3 NTSB 2997 (1980), recon. denied, 3 NTSB 3005 (1981).

The facts in the instant case established that the applicant reviewed the aircraft's logbooks following the inspection of August 1989. Because the aircraft passed an annual inspection in August of 1989, the law judge concluded that the applicant received an opinion from a qualified mechanic that N124K was airworthy. He saw further support for his view in the applicant's act of reviewing the aircraft's logbooks and documentation with the owner (who was neither a pilot nor an aircraft mechanic) after receiving Mr. Loftin's letter of October 10, 1989. We are unconvinced that this is enough to support a finding that the Administrator was not substantially justified in his position that the applicant should have known the aircraft was not airworthy. It is reasonable to believe that, after receiving the October letter informing him subsequent to the August 1989 annual inspection that the FAA was investigating the possible unairworthy condition of N124K, Mr. Crittenden should have had a qualified A&P mechanic determine whether the alleged discrepancies rendered the aircraft unairworthy before attempting to operate it again. It is also reasonable for the Administrator to assert that the applicant should have been alerted to the

possibility that the aircraft was unairworthy by completing a routine preflight inspection. We therefore find that the Administrator's position was substantially justified, in that it had a reasonable basis in fact and law. As such, an EAJA award is not warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted; and

2. The law judge's award of attorney fees and expenses is reversed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.